NO. 56986-8-II

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**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

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TALON CUTLER-FLINN,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Respondent.

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# BRIEF OF RESPONDENT

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ROBERT W. FERGUSON
Attorney General

TIMOTHY J. FEULNER
WSBA #45396
Assistant Attorney General
Corrections Division, OID #91025
P.O. Box 40116
Olympia, WA 98504
(360) 586-1445

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# I. INTRODUCTION

An agency complies with the Public Records Act (PRA) when it conducts an adequate search for records based on a reasonable interpretation of the request and provides all such records located as part of that search. Plaintiff Talon Cutler-Flinn sought all records "used" as part of a classification review in January 2020. After the Department's Public Records Unit (PRU) contacted staff at the Washington State Penitentiary (WSP), the facility where Cutler-Flinn was housed, the Department provided all of the records that were identified as being "used" by his classification counselor. Throughout this litigation, Cutler-Flinn has been unable to identify specific records that should have been provided to him in response to his request. As such, the superior court correctly held that the Department conducted an adequate search and did not violate the PRA. Additionally, the superior court did not abuse its discretion in denying Cutler-Flinn's various discovery motions and his motion to strike evidence from the Department's response brief.

## II. STATEMENT OF ISSUES

1. Did the superior court correctly conclude that the Department complied with the PRA by searching for records in the places most likely to contain responsive records and providing all the records that were located?

2. Did the superior court appropriately exercise its discretion in denying Cutler-Flinn's attempt to amend the discovery limits that were imposed based on the parties' agreement?

3. Did the superior court appropriately exercise its discretion in issuing various discovery orders to limit discovery to issues that were relevant to the PRA claims at issue in this case?

4. Did the superior court appropriately exercise its discretion in declining to strike Cutler-Flinn's deposition transcript or portions of the declarations of various witnesses?

5. Is Cutler-Flinn entitled to costs when he is not the prevailing party on appeal?

## III. STATEMENT OF THE CASE

### A. The Department's Classification System

The Department has a classification system by which it assigns incarcerated individuals to a given custody level. As part of this classification process, the Department conducts regular classification reviews for each incarcerated individual. CP 367. These classification reviews are very informal. CP 367. Such reviews are intended to address custody designations, programming needs and expectations, and facility placements. CP 70. The classification process is initiated by a conversation between the incarcerated individual and the individual's classification counselor. CP 367. The counselor talks to the individual about the upcoming review and answers any questions that the individual might have about the review. CP 367. The counselor then captures the input in a custody facility plan (CFP). CP 367. The CFP is designed to capture the information considered as part of a given classification process and the decisions that were made in that classification action. CP 367.

The actual classification "hearing" is conducted by Department staff either in the form of a multi-disciplinary team or a facility risk management team. CP 367. Although the Department refers to these meetings as hearings, these classification actions involve a discussion between the incarcerated individual and staff. CP 367. The hearing is generally short and informal. CP 367. The incarcerated individual is given at least forty-eight hours advance written notice of the hearing, unless the individual waives this notice, and the individual is given an opportunity to attend the hearing. CP 367.

**B. Cutler-Flinn's Public Records Request**

On January 21, 2020, Cutler-Flinn spoke to Cindy Meyer, his classification counselor at the time about his upcoming classification review. CP 402. Cutler-Flinn indicated that he wanted to stay at WSP but wanted to transfer to a different unit. CP 402. Cutler-Flinn informed Counselor Meyer that he did not want to attend his classification hearing and also signed a

Classification Hearing Notice/Waiver form indicating that he was waiving his appearance at the classification review. CP 402, 138.[1] At the facility risk management team meeting, staff recommended that he receive a custody promotion to medium custody and remain in the BAR units where he was housed at the time. CP 403. This plan was approved on January 29 by Correctional Program Manager Steven Sundberg. CP 403.

A few weeks later, the Department received a public records request from Cutler-Flinn. CP 449, 454. This request was assigned a tracking number of P-11804. CP 449. The Department acknowledged this request within five business days and informed Cutler-Flinn that he could expect an installment of records within thirty-two business days, on or before April 9, 2020. CP 460.

On the same day that the request was received, the assigned public records specialist, Chase McMillan, forwarded

[1] After the litigation started, Cutler-Flinn denied that he waived his appearance at the classification hearing. CP 504. This dispute is immaterial to this PRA case.

the request to WSP through the Department's GovQA system. CP 449. GovQA is web-based records software that the Department uses to process and manage its public records requests. CP 449. McMillan asked staff at WSP to provide all records "used" in the classification hearing that were not already located in the Department's OnBase system. CP 449. The reference to OnBase referred to one of the electronic systems that the Department uses to store and manage documents throughout the state. CP 448. WSP staff responded that same day and indicated that there were not responsive records. CP 450.

A few days later, on February 25, 2020, McMillan sent WSP staff an email to ask staff additional questions about the request. CP 457. Specifically, McMillan indicated that he had located the Classification Hearing Notice/Appearance Waiver form in OnBase, but McMillan asked staff to confirm that there were no other responsive records. CP 457. McMillian and another staff member in the Department's PRU subsequently

exchanged a series of emails with staff at WSP regarding the request. CP 456-57.

After a follow-up question from McMillian, Kitzi Brannock, the public records coordinator at WSP, provided a copy of the CFP from the Department's OMNI system. CP 457. OMNI is an electronic case management system that contains information about individuals incarcerated with the Department. CP 449.

The PRU then asked Brannock to contact Cindy Meyer, the classification counselor who initiated Cutler-Flinn's classification review to obtain any documents that she used for the classification review. CP 456. Brannock indicated that she had spoken to Meyer and that the only record that Meyer had was the Classification Hearing Notice/Appearance Waiver form. CP 456. Brannock also indicated that all of records that were reviewed had been provided. CP 456

Based on the information provided by WSP, McMillian sent Cutler-Flinn a letter the following day on February 26, 2020.

CP 462-63. This letter made five pages of records available to Cutler-Flinn once payment was received. CP 462-63. These records included the Classification Hearing Notice/Appearance Waiver form and the Custody Facility Plan from the January 2020 classification action. CP 468-72. The Department received payment for the records on March 16, and the Department mailed the five pages of records to Cutler-Flinn on the same day. CP 465-72. The Department did not receive any further correspondence from Cutler-Flinn related to this request until it was served with the lawsuit. CP 428.

## C. Procedural History

### 1. The Department Is Served with the Lawsuit and the Superior Court Issues a Scheduling Order

The Department was served lawsuit and a number of discovery requests, including twenty-four interrogatories, six requests for production, and nineteen requests for admission in September 2020. CP 20-21, 31-32. The parties subsequently appeared at a scheduling conference in Thurston County. CP 37-

38. Prior to the scheduling conference, the Department's counsel provided Cutler-Flinn with a copy of a draft scheduling order and spoke to Cutler-Flinn about the order. CP 30. Cutler-Flinn confirmed that he had read the order and indicated that he planned to sign the order. CP 30.

The superior court discussed the proposed scheduling order that was presented by the Department. CP 38-41. During the scheduling conference, Cutler-Flinn noted that the proposed order did not include dates but otherwise gave the impression that he was in agreement with the scheduling order. CP 39. After that issue was addressed, Cutler-Flinn did not express any concerns about the order. CP 39-45. The superior court then entered the agreed scheduling order as a result. CP 13-15. This order contained numerical limitations on discovery that applied to both parties. CP 14.

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### 2. Cutler-Flinn Files Various Discovery Motions, and the Superior Court Grants the Department's Motion for a Protective Order

Over a month later, Cutler-Flinn moved to amend the scheduling order to remove the previously agreed discovery limits. CP 19-22. Despite agreeing to the proposed order with the Department's counsel and at the scheduling conference, Cutler-Flinn now expressed disagreement with various aspects of the scheduling order, including the discovery limits. CP 19-22. Specifically, he now claimed that he had not agreed to the discovery limitations. CP 20. Cutler-Flinn also pointed out that he had already exceeded the interrogatory limit in his first set of discovery. CP 20-21. The Department responded and explained that it had not relied upon the fact that the discovery exceed the limits as the sole basis for declining to respond to discovery requests. CP 26, 31. The superior court denied the motion to amend the scheduling order without prejudice and allowed Cutler-Flinn to renew the request after the hearing on whether the Department violated the PRA. CP 547-48.

As the parties were preparing to resolve the issue of whether the Department complied with the PRA, the Department sought to take Cutler-Flinn's deposition. CP 151. Cutler-Flinn, however, refused to sit for a deposition despite the Department seeking and obtaining leave of court to do so. CP 151. The Department moved for sanctions for the refusal to sit for the deposition. CP 150, 155. The Department asked the superior court to compel Cutler-Flinn to sit for a deposition and also requested that the superior court continue the hearing on the merits of his claims until Cutler-Flinn sat for a deposition. CP 151, 155.

The parties appeared for a hearing on the motion for sanctions on February 19, 2021. CP __.[2] The superior court had not received a copy of Cutler-Flinn's response at that point and the motion for sanctions could not be heard as a result. However, the Court explained to Cutler-Flinn that it expected him to sit for

[2] The Department has filed a supplemental designation of clerk's papers and references to "CP __" refer to those documents.

a deposition. CP __. As a result, the Department agreed to withdraw the motion for sanctions without prejudice. The court also continued the merits of the PRA case and indicated that the parties should confer and agree to renote the hearing on the merits of Cutler-Flinn's claims once the deposition took place. CP __. The Department ultimately took Cutler-Flinn's deposition on May 5, 2021. CP 419.

Around the same time, Cutler-Flinn filed an omnibus motion that sought to compel answers to certain discovery responses. CP __. The court denied Cutler-Flinn's omnibus motion without prejudice and indicated that the parties should confer on any remaining discovery issues. CP __.

In early May, Cutler-Flinn filed another motion to compel and a motion to recuse. CP 157. This motion to compel was filed prior to conferring with the Department's counsel in response to the March 2021 order. CP 157. The Department responded to this second attempt to compel discovery after the February hearing by again indicating that Cutler-Flinn had failed to confer with the

Department's counsel. CP 157. In response to Cutler-Flinn's motion to recuse, the assigned superior court judge eventually decided to recuse herself from the case and the case was reassigned to another judge. CP __.

The parties had a discovery conference on June 30, 2021. CP 174. At the discovery conference, the parties reached an impasse on five interrogatories, and the Department moved for a protective order on those interrogatories. CP 160-66, 175. The Department's motion for a protective order outlined the concerns with those interrogatories. CP 160-66. Because Cutler-Flinn had renoted the motion to compel that he had filed in May, the Department also responded to the motion to compel. CP 168-71. In its response, the Department explained that the motion had been filed prior to the most recent discovery conference and did not appear to reflect the current status on discovery. CP 173-75.[3]

[3] Cutler-Flinn's statement of facts contains a number of statements that are not supported by the portions of the record that he cites or that are contradicted by the record. For example, Cutler-Flinn claims that the Department did not supplement its requests for admission and the superior court deemed those requests admitted. Cutler-Flinn's Brief, at 13. Both statements are incorrect. The Department did supplement its responses to the requests for admission. CP 174. And the superior court did not rule that the requests were

Cutler-Flinn then filed a motion for sanctions under CR 26(g). CP 212-33. The Department responded by outlining the procedural and substantive deficiencies in Cutler-Flinn's motion for sanctions, including the failure to follow the page limitations and the failure to have a discovery conference on many of the issues raised in the motion. CP 294-308.

The superior court held a scheduling conference and a hearing on the discovery motions on September 24, 2021. 9-24-21 RP 20-21.[4] The superior court issued a protective order with respect to five interrogatories because it found good cause to issue such an order and determined that the discovery was not reasonably likely to lead to admissible evidence. CP 543. The superior court denied Cutler-Flinn's motion to compel related to

admitted. CP 529-33 (containing no such decision). Cutler-Flinn also claims that the Department did not provide responses to his first set of discovery. Cutler-Flinn's Brief, at 16. However, this claim is misleading. Instead, the Department provided objections to discovery due to the need to get verified copies, CP 54, and subsequently provided verified copies a few weeks later once signatures had been obtained. CP 55. There are a number of other statements in the opening brief that are not supported or that do not accurately characterize the record. As such, this Court should be cautious in relying upon Cutler-Flinn's recitation of the facts.

[4] Initially, the court indicated that it was only going to consider Cutler-Flinn's motion to compel but after discussion with the parties, the court agreed to consider both motions at that hearing. 9-24-21 RP 5-10.

those five interrogatories.[5] CP 543. For any remaining outstanding discovery issues, the court denied Cutler-Flinn's motion to compel without prejudice. CP 543. The court also denied the motion for sanctions. CP 543. As part of the scheduling conference, the superior court explained its expectation that any discovery motions be resolved prior to the merits hearing. 9-24-21 RP 22, 25. The Court also reset the briefing schedule.

### 3. The Court Determines That the Department Did Not Violate the PRA

Cutler-Flinn submitted an opening brief, but this brief did not provide any clear identification of the records that he was asserting should have been provided to him. CP 320-30. Cutler-Flinn also supported his arguments with a declaration from incarcerated individual Jeffrey McKee regarding his purported knowledge of other lawsuits with the Department. CP 97-98. McKee is an individual who has often inserted himself into other

[5] These interrogatories were interrogatory numbers 1, 14, 15, 16, and 24.

incarcerated individuals' public records cases. *See, e.g.*, *Dep't of Corr. v. McKee*, 199 Wn. App. 635, 640-41, 399 P.3d 1187 (2017) (discussing McKee's attempts to use requests for classification records to profit from the PRA);[6] *Padgett v. Dep't of Corr.*, No. 51081-2-II, 2019 WL 2599159, at *2 (June 25, 2019).[7] The Department argued that the court should not consider the information in the McKee declaration. CP 355-56.

Prior to the Department filing its response brief, Cutler-Flinn filed another motion to compel and motion for sanctions. CP 342-48. In this motion, he asked the superior court to compel answers to a second set of discovery requests. CP 342-48. This set of discovery exceeded the agreed discovery limits. CP 497. Despite the court's instructions at the September scheduling conference to resolve all discovery issues prior to the hearing on

[6] The Department obtained a permanent injunction under RCW 42.56.565 against McKee based on his abuse of the PRA. CP 206-10.

[7] This case is unpublished. Consistent with GR 14.1, the Department informs the Court that this decision has no precedential value, is not binding on any court, and is cited only as factual background as the Court deems appropriate. *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

PRA liability, Cutler-Flinn noted his motion on the same day as the hearing on the merits of his PRA claims. CP 342.

The parties appeared for a hearing on the merits of Cutler-Flinn's claims and the other pending motions on December 10, 2021. 12-10-21 RP 4. Cutler-Flinn made an oral request for a continuance. 12-10-21 RP 7-8. In doing so, Cutler-Flinn represented to the court that he was "not planning on filing any more motions." 12-10-21 RP 8. And he reiterated that position when the court asked him questions. 12-10-21 RP 8 ("I am not planning on filing any motions, as I say, or filing anything else."). In granting the continuance, the superior court reiterated its understanding that Cutler-Flinn was not planning on filing any more pleadings. 12-10-21 RP 10.

Less than a week after that hearing and despite his statements that he was not filing any more documents, Cutler-Flinn filed a reply that included a motion to strike along with a "renewed" motion to compel and for sanctions. CP 509-20. The

Department filed a response arguing that the motion was untimely and that it failed on the merits. CP 521-27.

The court held a hearing on the merits on March 4, 2022.[8] The court determined that the Department did not violate the PRA in its response to Cutler-Flinn's request. The court made the following findings of fact:

> 1. The Department received Plaintiff Talon Cutler-Flinn's request on February 18, 2020. This request was assigned tracking number P-11804. The request sought all records "used in [Plaintiff's January 2020] classification process." Although this request was a request for identifiable public records for the reasons discussed below, it was a very broad request in that it sought "any and all records." Such a broad request does make it difficult to determine precisely what was being requested. The agency was justifiably confused about the precise nature of the records that Plaintiff was seeking.
>
> …
>
> 5. The Department's search was reasonable. The Department's search was appropriately focused on the places where any records could be located. The Department's reliance upon Plaintiff Cutler-

[8] The hearing was originally scheduled in January but was continued at both parties' request due to Cutler-Flinn being unavailable due to COVID-19 precautions taken at the time in his facility. CP __.

> Flinn's classification counselor at the time was reasonable, and the Department's public records staff conducted appropriate follow up with WSP staff.
>
> 6. Plaintiff has failed to identify any specific documents that were not provided in response to his request and that were within the scope of his request. Even if he were able to identify such documents, the Department's search was reasonable.

CP 538-39.

Based on these findings, the superior court concluded that the Department did not violate the PRA. CP 540. The court also denied Cutler-Flinn's motion to strike, motion to compel, and motion for sanctions. CP 539-40. The court explained that the motion to compel was untimely and that Cutler-Flinn had failed to identify additional discovery that was necessary or appropriate to the resolution of the merits. CP 540. The court also concluded that there was no basis for discovery sanctions in either the parties' communications or in the Department's objections and responses to discovery. CP 540. Cutler-Flinn subsequently filed a notice of appeal. CP 534.

## IV. STANDARD OF REVIEW

The Court reviews challenges to agency actions under the PRA de novo. *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009). Appellate courts stand in the same position as the trial courts when the record on a show cause motion consists only of affidavits, memoranda of law, and other documentary evidence. *Mitchell v. Wash. State Dep't of Corr.*, 164 Wn. App. 597, 602, 277 P.3d 670 (2011). However, unchallenged factual findings are treated as verities on appeal. *Adams v. Wash. State Dep't of Corr.*, 189 Wn. App. 925, 939, 361 P.3d 749 (2015).[9]

The remaining issues in this appeal are reviewed for abuse of discretion. Specifically, a superior court's decision to deny modification of a pre-trial order is reviewed for abuse of

[9] There appears to be a significant disagreement among Court of Appeals decisions about the proper standard of review for challenged factual findings in a PRA case. *Hoffman v. Kittitas Cnty.*, 4 Wn App. 2d 489, 500-05, 422 P.3d 466 (2018) (Lawrence-Berry, J., concurring) (recognizing the ambiguity but concluding the appropriate standard was substantial evidence), *affirmed by* 194 Wn.2d 217, 449 P.3d 277 (2019). In an appropriate case, this Court should clarify that issue and the Department would submit the appropriate standard is actually substantial evidence. This Court does not need to address that issue in this case though because Cutler-Flinn does not assign error to any of the trial court's factual findings. Given that the Department prevails under a de novo standard of review, it follows that it would also prevail if this Court applied a more deferential standard of review.

discretion. *See Corp. v. Atlantic-Richfield Co.*, 67 Wn. App. 520, 531, 837 P.2d 1030 (1992), *reversed on other grounds by* 122 Wn.2d 574, 860 P.2d 1015 (1993). Likewise, a superior court's granting of a motion for a protective order, denial of a motion to compel, and a denial of sanctions under CR 26(g) are all reviewed for abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006); *Clarke v. State Att'y General's Off.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006); *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). Finally, a trial court's decision on a motion to strike a declaration that allegedly contains inadmissible evidence is reviewed for abuse of discretion. *See Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 247, 178 P.3d 981 (2008).

## V. ARGUMENT

### A. The Superior Court Correctly Dismissed Cutler-Flinn's PRA Claims Because The Department Conducted an Adequate Search

Under the PRA, an agency is obligated to conduct an adequate search when it receives a request for identifiable public

records. *See Neighborhood Alliance of Spokane Cnty. v. Spokane Cnty.*, 172 Wn.2d 702, 721, 261 P.3d 119 (2011). When examining whether an agency conducted an adequate search, the focus is not whether additional responsive documents were found but whether the agency's search was reasonably calculated to find the responsive documents. *Neighborhood Alliance*, 172 Wn.2d at 719-20. The failure to locate and produce records is not a per se violation of the PRA. *See Block v. City of Gold Bar*, 189 Wn. App. 262, 274, 355 P.3d 266 (2015); *Cantu v. Yakima Sch. Dist. No. 7*, 23 Wn. App. 2d 57, 83, 514 P.3d 661 (2022); *see also O'Dea v. City of Tacoma*, No. 53613-7-II, at ¶ 79, 19 Wn. App. 2d 67, 493 P.3d 1245 (2021).[10] Instead, an agency does not violate the PRA when it conducts a reasonable search and provides all records located as part of such a search.

[10] This case is unpublished in part and the Department is citing to the unpublished portion. Consistent with GR 14.1, the Department informs the Court that this portion of the decision has no precedential value, is not binding on any court, and is cited only as persuasive authority as the Court deems appropriate. *Crosswhite v. Wash. State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017). Additionally, when citing to the unpublished portion, the Department cites to the paragraph numbers of the relevant portion.

The superior court correctly found that the Department conducted an adequate search. In the superior court's unchallenged factual findings, it determined that the nature of Cutler-Flinn's "broad request does make it difficult to determine precisely what was being requested" and "[t]he agency was justifiably confused about the precise nature of the records that Plaintiff was seeking." CP 538. The superior court also found that Cutler-Flinn "has failed to identify any specific documents that were not provided in response to his request and that were within the scope of his request." CP 539. Such unchallenged findings are verities on appeal. This Court should affirm.

When the Department received the request, its public records staff directed the request to WSP where Cutler-Flinn was housed and where the classification action took place. Cutler-Flinn's classification counselor, Cindy Meyer, was asked to search for records. CP 476. Meyer was asked to search for records that were not located in OnBase because the public records specialist had access to the records in OnBase. CP 457

(indicating that the specialist had pulled records from OnBase); CP 480. After an initial response from WSP, the Public Records Unit (PRU) worked to confirm that all records had been identified by twice asking follow-up questions CP 456-57. The PRU specifically asked if Meyer had reviewed any other records in OMNI, the Department's other records system, as part of the classification review. CP 456. Meyer confirmed that the only such record was the CFP. CP 456. Once it was confirmed that all records had been identified, the records were provided to Cutler-Flinn. CP 462-63.

As the superior court found, such a search was reasonable. The classification process is initiated by the incarcerated individual's classification counselor. CP 367-68. Cutler-Flinn's classification counselor was the person most likely to have responsive records. Indeed, she was specifically mentioned in the request. CP 454. She was asked to search initially, and the Department's public records staff conducted additional follow-up inquiries to make sure that all the records had been gathered.

Such a search was reasonably calculated to locate all responsive records.

Cutler-Flinn argues that the Department should have contacted other staff on the Facility Risk Management Team. However, this argument ignores that it is the classification counselor who is the person responsible for initiating the review and generating the CFP. CP 367-68. It also ignores the informal nature of these classification reviews. CP 367. Indeed, when asked, the FRMT members confirmed that the only document that they considered as part of Cutler-Flinn's review was the CFP. CP 437-42. That document was provided to Cutler-Flinn.

Cutler-Flinn also asserts that the Department admitted Custody Unit Manager Katrina Suckow reviewed records that were not provided. Cutler-Flinn's Brief, at 26 (citing CP 63). A review of that discovery answer, however, demonstrates that Cutler-Flinn is incorrect. Instead, Ms. Suckow reviewed the CFP. CP 63. The CFP was provided to Cutler-Flinn in response to his public records request. Similarly, responses from other

staff indicate that they either reviewed the CFP or relied only upon information provided verbally by the counselor during the Facility Risk Management Team meeting. CP 64-69.

As he has throughout these proceedings, Cutler-Flinn makes only the most conclusory arguments that additional documents should have been provided. Like in the superior court, he fails to identify to this Court any specific document that was responsive and should have been provided. When asked at the hearing about whether there were specific records that were not produced, Cutler-Flinn could not identify any such records. 3-4-22 RP 24. When asked during his deposition regarding the scope of his request, he was unable to provide any clarification and simply stated that he was looking for unspecified documents that were purportedly mentioned in Department policies. CP 420-24. Instead, he mentions only pieces of information, not records. But, the PRA applies to specific records and does not involve requests for information. *See, e.g.*, *Smith v. Okanogan Cnty.*, 100 Wn. App. 7, 12, 994 P.2d 857 (2000).

Similarly, Cutler-Flinn argues that other "information" was used by the Department in his classification action and makes conclusory assertions that the CFP identified other records that were used in his classification action. Cutler-Flinn indicates that he wanted "records of a detainer," presumably because the CFP provided information about detainers in one of the pre-populated sections. Cutler-Flinn's Brief, at 26. However, this argument again appears to conflate information with specific records. Despite multiple chances to identify specific records throughout this litigation, Cutler-Flinn failed to identify any such records.

Even if Cutler-Flinn could identify records that he was seeking at this stage, the Department conducted a reasonable search and such a search precludes a finding of a PRA violation. As the superior court correctly found, the Department conducted an adequate search for records in response to this request. Therefore, even if records were not located, the fact that the

search was reasonable precludes a PRA violation based on the alleged failure to locate such records.

Because the superior court correctly concluded the Department did not violate the PRA, this Court should affirm the dismissal of Cutler-Flinn's PRA claims.

### B. The Superior Court Did Not Abuse Its Discretion in Denying Cutler-Flinn's Motion to Modify the Case Schedule

The superior court did not abuse its discretion in denying Cutler-Flinn's motion to modify the initial scheduling order that set limits on discovery. At the scheduling conference, Cutler-Flinn's statements suggested that he had read the scheduling order and that the only issue that he was concerned about were the missing dates in the briefing schedule. CP 39-40. Cutler-Flinn never indicated that he had any objection to the discovery limits. Prior to the scheduling conference, Cutler-Flinn also informed the Department's counsel that he had read the scheduling order. CP 30. It was only after the order was signed that Cutler-Flinn filed a motion claiming that he was somehow

deceived by the content of the scheduling order. As the Department indicated below, other statements made in the motion to modify were flatly contradicted by the record. CP 26. In light of such evidence, the superior court acted well within its discretion to decline to modify the discovery limits at that point in time while permitting Cutler-Flinn to renew his request after the hearing on PRA liability.

Cutler-Flinn argues that the case scheduling order prevented him from gathering relevant evidence. Cutler-Flinn's Brief, at 29. Neither in the superior court nor in this Court, however, has Cutler-Flinn identified which additional discovery requests he would have made and what information he would have obtained if he could have done more discovery requests. As such, his arguments that additional discovery was necessary are unsupported.

Cutler-Flinn also argues that the Department's counsel relied upon the scheduling order as a basis for declining to respond to certain discovery requests that were propounded with

the complaint. Cutler-Flinn's Brief, at 29. That characterization is incorrect. As the Department indicated, it had not relied upon the fact that his initial discovery exceeded those limits alone to object to any discovery that was served with the complaint. CP 26-27. In other words, despite the existence of mutually binding and agreed limits on discovery, the Department agreed to allow Cutler-Flinn to exceed such limits to a degree.

Finally, Cutler-Flinn invokes the case law that refers to a right to discovery, such as *Lowy v. PeaceHealth*, 174 Wn.2d 769, 280 P.3d 1078 (2012). Such case law refer to discovery through the civil rules. But Civil Rules 16 and 26 envision that courts can limit discovery and that the parties can stipulate to discovery limits. That is exactly what happened here. The agreed upon limitations did not infringe upon Cutler-Flinn's right to do discovery. And again, he has failed to establish what additional, relevant discovery he would have done. Thus, the superior court did not abuse its discretion in denying Cutler-Flinn's motion to modify the discovery limits without prejudice.

## C. The Superior Court Did Not Abuse Its Discretion in Ruling on the Discovery Motions

A trial court has broad discretion to manage the discovery process and, if necessary, limit the scope of discovery. *Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 276-78, 191 P.3d 900 (2008). A trial court's granting of a motion for a protective order and denial of a motion to compel are both reviewed for abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006); *Clarke v. State Att'y General's Off.*, 133 Wn. App. 767, 777, 138 P.3d 144 (2006).

### 1. Cutler-Flinn's Vague Assertions Regarding Discovery Are Conclusory and Inadequately Briefed

Courts do not generally address arguments that are not supported by citation to authority or argument. *PacificCorp v. Wash. Utils. & Transp. Corp.*, 194 Wn. App. 571, 589 n.15, 376 P.3d 389 (2016). Passing treatment of an issue is insufficient to warrant judicial consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998).

Although Cutler-Flinn devotes a number of pages in his brief to his assertions regarding various discovery issues, these arguments are replete with conclusory allegations. Other than the arguments regarding the motion for a protective order, he does not identify the specific ruling by the superior court that he is challenging in terms of his motions to compel and motions for sanctions.

This failure is significant because Cutler-Flinn filed multiple such motions. Some of those decisions, such as the motion to compel that was part of his omnibus motion, have not been appealed to this Court. Other motions, such as his May motion to compel, have not been made part of the record on appeal. His sparse citations to the record appear to be to the discovery responses themselves and not to either the places in the record where he raised such arguments below or where the superior court decided such issues. This failure leaves the burden on this Court to decipher where and if Cutler-Flinn raised the same arguments below.

Moreover, on appeal, Cutler-Flinn does not explain what sanction he believes is appropriate or necessary to the resolution of the case. Likewise, he does not articulate in any meaningful manner how the discovery in question would have impacted the decision on the merits of his PRA claims. *See Lake Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co.*, 176 Wn. App. 168, 183-84, 313 P.3d 408 (2013) (affirming denial of motion to compel when it would not have changed the outcome). Given the absence of adequate briefing or any reasoned explanation of how these various discovery issues would have impacted the outcome, this Court can affirm on that basis.

### 2. The Superior Court Did Not Abuse Its Discretion in Granting the Department's Motion for a Protective Order

Cutler-Flinn served a number of incredibly broad discovery requests with his complaint. One such request, interrogatory number one, asked the following:

> For each answer to the operative complaint subsections 2.1 through 2.6 in which you either denied the allegation or neither could admit nor deny the allegation, identify and describe in detail all material facts you considered to either deny or neither admit nor deny.

CP 196. This interrogatory appeared to be some kind of attempt at a contention interrogatory. This request did not seek facts that supported certain defenses or contentions though.[11] Instead, unlike more appropriate contention interrogatories, this interrogatory appeared to be specifically directed at seeking the information considered by the Department's counsel in answering the complaint. Indeed, Cutler-Flinn confirmed that was his intent in propounding this interrogatory. CP 175. Such information would inevitably reveal the mental impressions of the Department's attorney. Among other things, the work product doctrine is intended to protect the mental impressions of an attorney. *Limstrom v. Ladenburg*, 136 Wn.2d 595, 611, 963

[11] The Department questions whether service of this kind of boilerplate contention interrogatory with the complaint itself comports with CR 26(g). Without having seen the opposing party's answer, it is difficult to understand how a plaintiff could properly certify that the request comports with the criteria in CR 26(g).

P.2d 869 (1998). Mental impressions of an attorney are absolutely protected by the work product unless such mental impressions are directly at issue. *Id.*

Moreover, as the Department pointed out in its motion for a protective order, the Department actually admitted the vast majority of information in subsections 2.1 through 2.6 of the complaint. *Compare* CP 2-3, *with* CP 8-9.[12] The Department's counsel suggested that the issue could be resolved by Cutler-Flinn propounding a contention interrogatory that was more appropriately focused on specific issues in dispute. CP 175. Cutler-Flinn refused that option. CP 175. The relevance of this interrogatory to the issues actually in dispute was not readily apparent and Cutler-Flinn has not explained the specific information that he was seeking. Given that, the Department appropriately objected to this interrogatory and the court appropriately granted a protective order on that basis.

[12] Cutler-Flinn states that "[t]he Department denied the majority of the allegations." Cutler-Flinn's Brief, at 8. A review of Department's answer shows that this statement is demonstrably untrue.

The superior court also did not abuse its discretion in issuing a protective order related to interrogatories 14, 15, and 16. Those interrogatories sought the following:

> **INTERROGATORY NO. 14:** The Classification Hearing Notice Appearance / waiver (Classification Notice) DOC form 05-794 revised 12/23/14 under "Offender Rights" stated "You have the right to submit a written request for a review of all pertinent official records in the offender file through the Records Manager, using DOC 05-066 Request for Disclosure of Records". Identify & describe in detail why the Depaartment [sic] of Corrections provided this notice & the specific procedure the Department used to produce responsive records.
>
> **INTERROGATORY NO. 15:** The Classification Notice DOC form 05-794 was revised on 9/20/16 under "Offender Rights" stated "You may submit a public disclosure request to obtain a copy of the records used in your classification process. Refer to DOC 280.510 Public Disclosure of Records for additional information." Identify & describe & describe in detail why the language was changed in this revision & the specific procedure the Department uses to produce the Department used to produce responsive records.
>
> **INTERROGATORY NO. 16:** The Classification Notice DOC form 05-794 was revised on 10/19/18 under "Offender Rights" all language related to accessing the records used in the classification

> process was removed. Identify & describe in detail why the language was removed in this revision.

CP 198-99. The superior court did not abuse its discretion in determining such interrogatories were not relevant to the issues in this case. These interrogatories sought information about prior versions of the Department's classification form and issues related to classification. It is undisputed that the classification notice from Cutler-Flinn's classification review in 2020 did not contain such language. CP 468. Indeed, interrogatories 14 and 15 sought information about the Department's classification processes prior to Cutler-Flinn's incarceration. CP 163-64. Neither in the superior court nor in this Court has Cutler-Flinn even attempted to explain how such information is relevant to the Department's response to his public records request in 2020. Cutler-Flinn's Brief, at 41 (claiming in a conclusory manner that this discovery "directly relates to the issue of identifiable records and subsequent bad faith"). The language on past classification notices has no apparent impact on the issue of whether the

Department violated the PRA in responding to Cutler-Flinn's request. As such, the superior court did not abuse its discretion in issuing a protective order with respect to these three interrogatories.

Finally, the superior court did not abuse its discretion in granting a protective order with respect to interrogatory number 24. That interrogatory sought:

> **INTERROGATORY NO. 24:** Identify & describe in detail any & all instructions, directives, policy changes, & any other information provided to any Department personnel that is/was a result of litigation in Joseph L. Jones V. WDOC, Franklin County Superior County related to his November 3, 2014 PRA request for records used in his classification notice; Jeffrey R. McKee v. WDOC, Franklin County Superior Court No. 16-2-02882-3; Taylor Landrum at al v. WDOC, Spokane County Superior Court No. 17-2-03019-2; & Travis L. Padgett v. WDOC, Spokane County Superior Court related to Department tracking number PRU-50664.

CP 200. This interrogatory on its face was incredibly broad because it sought every piece of information provided to Department personnel as part of four prior lawsuits. CP 165. The interrogatory also appeared to include all communications

between the Department's attorneys and the Department about these prior cases. CP 165.

Again, Cutler-Flinn does not explain what relevance such information would have to his lawsuit or the Department's obligations under the PRA. And contrary to his characterization, it is much broader than simply asking about any changes made in response to past classification lawsuits. As the Department explained, even if Cutler-Flinn could explain some marginal relevance of such information, such relevance would be significantly outweighed by the Department having to search for every communication related to five prior lawsuits. CP 165. As such, the superior court correctly granted a protective order related to that interrogatory.

Because the superior court did not abuse its discretion in denying the Department's motion for a protective order, this Court should affirm that decision.

### 3. The Superior Court Did Not Abuse Its Discretion in Denying Cutler-Flinn's Motion to Compel

As discussed above, trial courts have broad discretion to manage the discovery process. *Nakata*, 146 Wn. App. at 276-78. Cutler-Flinn fails to show any abuse of discretion on the part of the superior court in denying his motion to compel.

As an initial matter, Cutler-Flinn does not explain which of the decisions denying his motions to compel he is challenging on appeal. Cutler-Flinn also does not identify which portion of the record supports his assertion that he moved to compel responses to the discovery requests mentioned. That failure is significant given that the trial court denied some on substantive grounds and others on procedural grounds. Moreover, some of the requests that Cutler-Flinn mentions in his opening brief were actually supplemented by the Department, such as interrogatories 12 and 18, (CP 174), making the basis of his arguments confusing. Nor does Cutler-Flinn provide any persuasive reason how the discovery that he mentions would

have impacted the trial court's decision on the merits of his case. Based on these failures, Cutler-Flinn has failed to demonstrate an abuse of discretion.

Other than the interrogatories that were the basis for the Department's motion for a protective order, the discovery requests mentioned in Cutler-Flinn's brief were never part of a procedurally proper motion to compel that was decided on the merits. At the September 2021 hearing, the superior court specifically denied the motion to compel without prejudice on any requests that were not the basis of the protective order. CP 543. At the March 2022 hearing, the superior court denied the motion to compel as untimely. CP 540. Cutler-Flinn does not explain which decision is being challenged on appeal, or how the superior court abused its discretion in denying his motions on such procedural grounds.

The failure to raise issues in a procedurally proper and clear manner before the trial court is prejudicial to the Department. For example, before this Court, Cutler-Flinn claims

that the superior court abused its discretion in denying a motion to compel responses to interrogatory numbers 12 and 18. Cutler-Flinn's Brief, at 31. Cutler-Flinn does not cite any portion of the record where he sought to compel such responses. And he entirely fails to recognize that the Department actually supplemented its responses to these two interrogatories after a discovery conference. CP 174.

In terms of Cutler-Flinn's other arguments, the superior court did not abuse its discretion in denying the motion to compel on interrogatories 1, 14, 15, and 16. As discussed above, the superior court appropriately granted a protective order. Accordingly, the trial court did not abuse its discretion with respect to the motion to compel.

Cutler-Flinn also identifies interrogatories number 12 and 18 as discovery that the superior court should have granted a motion to compel. The Department, however, supplemented its responses to those interrogatories after reaching an agreement with Cutler-Flinn. CP 170 (discussing agreement to supplement);

CP 174 (similar). Cutler-Flinn does not explain what additional information should have been compelled.

Cutler-Flinn next mentions his motion to compel his requests for production. He does not analyze the individual requests for production or appear to recognize that the Department provided him copies of documents in response to some of the requests. CP 248. Such a failure is significant because certain requests appeared to be overly broad and have only marginal, if any, relevance to this case. For example, Cutler-Flinn asked for a copy of his entire central file and "electronic file." CP 191. Cutler-Flinn also sought "all records related" to public records requests that resulted in lawsuits with other inmates. CP 192. Instead of doing any kind of meaningful, individualized analysis of the requests for production, he takes the position that the Court should have compelled the Department to make the documents available for inspection at his prison. Cutler-Flinn's Brief, at 32. Specifically, it appears that

Cutler-Flinn wanted the Department's counsel to bring the documents to the WSP. *Id.*

Civil Rule 34 however, requires a reasonable place and manner of inspection. CR 34(b)(2)(B). Cutler-Flinn made it clear that he was only asking to inspect the records and wanted the inspection to occur at WSP. CP 237. Inspection at Cutler-Flinn's prison was not a reasonable request under CR 34. *See, e.g.*, *Niagara Duplicator Co. v. Shackleford*, 160 F.2d 25, 26-27 (D.C. Cir. 1947) (concluding inspection in Washington, D.C., when records were maintained in California was unreasonable); *Mid-America Facilities, Inc. v. Argonaut Ins. Co.*, 78 F.R.D. 497 (E.D. Wis. 1978) (indicating that party complied with Rule 34 by making documents available where they were maintained); *see also Cardenas v. Dorel Juv. Group, Inc.*, 230 F.R.D. 611, 619-20 (D. Kan. 2005) (stating general rule that Rule 34 does not require a party that produces records to bear the expense of

photocopies). Cutler-Flinn does not explain how inspection at his prison was a reasonable request.[13]

To attempt to resolve this issue, the Department's counsel offered Cutler-Flinn a number of reasonable options including documents on a CD to a non-incarcerated person or paper copies with the first 100 pages being free and the remaining pages costing 10 cents per page.[14] CP 54. The Department's counsel also attempted to provide Cutler-Flinn lists of certain documents, such as the Newsbriefs, to attempt to narrow Cutler-Flinn's voluminous requests. CP 202-03. Cutler-Flinn indicated that he was planning to notify the Department's counsel which documents he was seeking, CP 175, but instead Cutler-Flinn merely filed various motions.

[13] Cutler-Flinn suggests that the documents were maintained at his prison. However, this assertion ignores that the documents had been gathered by the Department's counsel and the copies that were being made available to him as part of discovery were located in Olympia, Washington.

[14] Cutler-Flinn claims that the Department offered to send paper copies to a non-incarcerated person. However, this statement is incorrect. The Department offered to send paper copies to him, or a CD to a non-incarcerated person. CP 54.

Cutler-Flinn has failed to explain how the options that were offered to him to obtain the documents were unreasonable. As the Department indicated below, courts have upheld similar opportunities to obtain documents in discovery as reasonable. *See, e.g.*, *Bishop-McKean v. Wash. Dep't of Corr.*, No. 3:20-CV-5416-JLR-DWC, 2021 WL 3021936, at *2-3 (W.D. Wash. July 16, 2021); *Holmberg v. Vail*, No. 11-5449 BHS/KLS, 2012 WL 3985856, at *1-2 (W.D. Wash. Sept. 10, 2012). Rather than availing himself of those reasonable options, Cutler-Flinn insisted on a single option, i.e. inspection at his prison. Cutler-Flinn fails to show that the superior court abused its discretion in rejecting such a request.

Finally, Cutler-Flinn mentions interrogatory number 26, although the portions of the record cited do not refer to that interrogatory. Cutler-Flinn's Brief, at 31. Instead, the set of interrogatories in question refer to a set of interrogatories that only contained twenty-four interrogatories. It is unclear what Cutler-Flinn is referencing.

Therefore, because Cutler-Flinn failed to show that the superior court abused its discretion in denying his motion to compel, this Court should affirm that decision.

#### 4. The Superior Court Did Not Abuse It Discretion in Denying Cutler-Flinn's Motion for Sanctions

A trial court's denial of motion for discovery sanctions is reviewed for abuse of discretion. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *Wash. Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012). Under Civil Rule 26(g), an attorney who signs discovery certifies that this attorney has reviewed the request, response, or objection, and that to the best of the attorney's knowledge, information, and belief formed after at reasonable inquiry, the request, response, or objection is consistent with the rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. CR 26(g); *Mayer*, 156 Wn.2d at 685. A violation of

this certification requirement provides a basis for sanctions. *Wash. Motorsports Ltd. P'ship*, 168 Wn. App. at 715.

The trial court did not abuse its discretion in denying sanctions under 26(g). The Department responded to discovery appropriately within the parameters of the civil rules. The Department responded to appropriate discovery requests and appropriately raised concerns related to some requests with objections. The Department's counsel then attempted to work collaboratively with Cutler-Flinn to resolve discovery issues. The Department's counsel successfully sought a protective order related to discovery about which the parties reached an impasse and continued to work to find solutions on the other requests. Such conduct is consistent with CR 26(g) and the purpose of the discovery rules.

In arguing that the superior court should have imposed sanctions, Cutler-Flinn merely makes conclusory assertions about the Department's responses to discovery. He claims that "[a]ll [of] Mr. Feulner's objections and refusal to answer were

intended to frustrate Mr. Flinn's ability to litigate this case, caused unnecessary delay and increased the cost of litigation." Cutler-Flinn's Brief, at 34. Without identifying what type of sanction he was seeking or how it would impact the merits of his claims, Cutler-Flinn repeatedly claims in a conclusory fashion that the Department's objections have long been held to be sanctionable. Such conclusory statements do not demonstrate an abuse of discretion.

Instead, Cutler-Flinn's arguments regarding sanctions simply repeat his arguments related to his motion to compel. For the reasons discussed above, the superior court did not abuse its discretion in denying his motion to compel. Moreover, the record belies the notion that the Department's counsel interfered with Cutler-Flinn's ability to litigate the case or do discovery. The Department's counsel repeatedly attempted to work to find solutions to disagreements about discovery, including supplementing discovery requests based on agreements to narrow or revise such requests. None of the cases cited by Cutler-

Flinn demonstrate that the conduct of the Department's counsel in this case was sanctionable. As the superior court concluded, there was no basis for sanctions in the communications from the Department's counsel or the discovery responses. CP 540.

Therefore, the superior court did not abuse its discretion in denying the motion for sanctions.

### D. The Trial Court Did Not Abuse Its Discretion in Denying Cutler-Flinn's Motion to Strike

A ruling on a motion to strike is an exercise of discretion and is reviewed for abuse of discretion. *Oltman v. Holland America Line USA, Inc.*, 163 Wn.2d 236, 247, 178 P.3d 981 (2008); *King Cnty. Fire Prot. Dists. No. 16, No. 36, & No. 40 v. Hous. Auth. of King Cnty.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994).[15] Under this standard, courts consider the superior court's interpretation of the evidence rules under a de novo

[15] Cutler-Flinn argues that the standard of review is de novo and cites *Momah v. Bharti*, 144 Wn. App. 731, 182 P.3d 455 (2008), in support of this argument. Cutler-Flinn's Brief, at 37. This Court is not reviewing a summary judgment decision though. It is reviewing the superior court's resolution of the PRA claims on the merits through the show cause process which allows a court to resolve disputed issues on the briefing. RCW 42.56.550(3). Such a decision was effectively a decision after a trial on the merits, albeit on written briefing. Evidentiary rulings in such cases should be reviewed for abuse of discretion. Even if this Court applies a de novo standard of review, it should still affirm.

standard of review. *State v. Rushworth*, 12 Wn. App. 2d 466, 470, 458 P.3d 1192 (2020), but review the application of the evidence rules for an abuse of discretion. *Id.*, at 470.

Cutler-Flinn challenges the denial of the motion to strike the transcript of his deposition and various portions of the declarations submitted by the Department. He fails to show the superior court's evidentiary rulings were an abuse of discretion.

### 1. The Superior Court Did Not Abuse Its Discretion in Denying the Motion to Strike the Deposition Transcript

Civil Rule 32(d)(4) indicates that "[e]rrors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained." CR 32(d)(4). Under CR 30(e), the transcriber of the deposition is expected to submit the transcript to the

witness for examination. CR 30(e). If the deposition is not signed within thirty days, the deposition is signed by the officer who transcribed the deposition and that person states the reason, if any, for the failure to sign the deposition. CR 30(e).

Cutler-Flinn asserts that the superior court abused its discretion in failing to the strike the excerpts of his deposition transcript. In the superior court, Cutler-Flinn was unable to identify any specific portions that he was contending were incorrectly transcribed. 3-4-22 RP 24. Likewise, in his Brief, he does not assert that any portions were incorrectly transcribed and does not otherwise argue that he was prejudiced by his asserted inability to review the transcript. He also does not explain how the denial of this motion changed the outcome on the merits of his PRA claims. For these reasons alone, he has failed to show that the denial of the motion to strike is reversible error.

Regardless, the trial court did not abuse its discretion for two independent reason. First, the motion to strike was untimely. Civil Rule 32 requires a motion to suppress be made with

reasonable promptness. CR 32(d)(4). Waiting for six months to raise the issue on the eve of the merits hearing is not reasonable promptness. *See In re Ashley*, 903 F.2d 599, 603 (9th Cir. 1990); *Fortenberry v. Bd. of Sch. Trs.*, 149 F. Supp. 2d 542, 550 (N.D. Ind. 2000) (concluding that waiting for three months was not reasonably prompt). In this case, the deposition was taken on May 5, 2021. CP 419. Even accounting for time that the court reporter would have needed to transcribe the deposition, Cutler-Flinn should have reasonably known by the end of Junes that the transcript was done and needed to be reviewed by him. Yet, he did not raise the issue until his reply brief that was filed in December 2021. CP 511-12. And this reply brief was filed after he told the superior court that he did not intend to file any more documents. 12-10-22 RP 8. Cutler-Flinn provided no evidence that he attempted to address the issue with the Department's counsel or the court reporter prior to that date. Such actions do not constitute reasonable promptness.

Cutler-Flinn claims that he raised the issue in a timely manner because, according to him, he raised the issue twenty-four days after receiving the transcript and had no prior notice that the Department intended to use the transcript at the hearing on liability. Cutler-Flinn's Brief, at 37. That argument, however, ignores that the Department had specifically moved to extend the briefing deadlines in the case so that it could take his deposition for use at that hearing. CP 151. Cutler-Flinn points to no evidence that led him to believe the Department's intention in terms of the deposition transcript had changed.[16] Given that, even if the Court credits his claim that he was surprised by the use of the transcript, his belief that the transcript was not being used was unreasonable. As such, there is insufficient evidence that he could not have discovered the issues with the transcript earlier by exercising due diligence.

[16] Cutler-Flinn claims that he was unaware that the Department ordered the transcript. This argument was not raised in the superior court and is waived. RAP 2.5(a). By failing to raise it in the trial court, Cutler-Flinn prevented the Department from submitting factual evidence directed toward Cutler-Flinn's knowledge of whether the Department's counsel ordered the transcript.

Cutler-Flinn also asserts that Department was obligated to provide him with a copy of the transcript for him to review. Cutler-Flinn's Brief, at 37 (citing *Easterday v. South Columbia Basin Irrigation Dist.*, 49 Wn. App. 746, 750-54, 745 P.2d 1322 (1987)). *Easterday* does not support that proposition though. Instead, in *Easterday*, the Court of Appeals concluded that a court reporter had complied with its obligation to submit a transcript by making the transcript available at the court reporter's office for the witness to review and sign. *Easterday*, 49 Wn. App. at 753. It does not conclude that the party who took the deposition bears the responsibility of ensuring that the witness reviews the transcript. Indeed, it suggests that the court reporter bears such a responsibility. Regardless, Cutler-Flinn does not provide any reasoned explanation for why he chose to not even attempt to address the issue with either the court reporter or the Department's counsel for months after the deposition was taken. By waiting such a lengthy time, he waived any objections to his failure to review the transcript.

Finally, even if Cutler-Flinn had raised this issue in a timely manner, he does explain why the remedy would be striking the entire transcript. When a witness makes corrections to a deposition transcript, the original transcript remains admissible evidence. *See Seattle-First Nat'l Bank v. Rankin*, 59 Wn.2d 288, 293-94, 367 P.2d 835 (1962). In other words, even if he made corrections, the Department could have relied upon the original transcript. Cutler-Flinn could then have argued the corrected transcript was more accurate. But again, he has never identified any portions of the transcript that were inaccurate.

Even if he could identify errors in the transcript and there was a defect in the preparation of the transcript, Cutler-Flinn cites no applicable authority for the idea that this defect requires the suppression of the entire transcript. Other courts that have considered this kind of objection have rejected the idea that such an argument warrants suppression of the entire transcript. *See, e.g., Hawkins v. Home Depot USA, Inc.*, 294 F. Supp. 2d 1119, 1124-25 (N.D. Cal. 2003) (declining to strike entire transcript

based on this kind of objection). Therefore, the trial court did not abuse its discretion in denying Cutler-Flinn's motion to strike the excerpts of his deposition.

### 2. The Superior Court Did Not Abuse Its Discretion in Denying Cutler-Flinn's Motion to Strike Declarations

Cutler-Flinn argues that portions of the declarations of Denise Vaughan, Kitzi Brannock, and Scott Buttice should have been struck. He asserts that the Vaughan and Brannock declaration are inadmissible because they contained "opinions based on the attached records" and are conclusory statements. Cutler-Flinn Brief, at 38. Cutler-Flinn challenges a portion of the Buttice declaration because Cutler-Flinn claims that Buttice referred to records that he did not specifically identify. Cutler-Flinn Brief, at 38-39.

As an initial matter, Cutler-Flinn's arguments related to these declarations are extremely cursory. He does not explain in any meaningful manner how the superior court's decision to deny his objections constituted an abuse of discretion. Moreover,

Cutler-Flinn himself appears to rely upon portions of these declarations in his opening brief to support his arguments. *See, e.g.*, Cutler-Flinn's Brief, at 6-7 (citing to documents authenticated in paragraphs of the Vaughan declaration that he seeks to strike). Cutler-Flinn does not explain how these evidentiary objections would change the outcome of the superior court's decision or the issues on appeal. Because his arguments are not adequately briefed, the Court can affirm on that basis. *See, e.g., West v. Thurston Cnty.*, 168 Wn. App. 162, 186-87, 275 P.3d 1200 (2012).

In terms of his individual objections, Cutler-Flinn's objection to the Vaughan declaration appears to be based on the fact that she was not involved in the Department's initial response to the request. As her declaration indicates, Ms. Vaughan oversees the Department's PRU and also has access to records maintained by the Department related to the Department's processing and handling of public records

request.[17] CP 447-49. The statements in her declaration are supported by records attached to her declaration. CP 454-74. In cases involving open record act challenges, courts have recognized that an agency may submit declarations from employees who are responsible for coordinating record searches. *See, e.g.*, *Lahr v. Nat'l Transp. Safety Bd.*, 569 F.3d 964, 990 (9th Cir. 2009); *Maynard v. C.I.A.*, 986 F.2d 547, 560 (1st Cir. 1993); *Glass v. Anne Arundel Cnty.*, 453 Md. 201, 223 n.24, 160 A.3d 658 (Md. 2017). Ms. Vaughan's description of the Department's response to Cutler-Flinn's request, which Cutler-Flinn himself does not appear to dispute, was admissible and the superior court did not abuse its discretion in declining to strike it.

With respect to the Kitzi Brannock declaration, Cutler-Flinn objects to the portion of her declaration that discusses a phone call that Brannock had with Cindy Meyer. Cutler-Flinn asserts that the second and third sentences of paragraph 6 of her

[17] By the time of the lawsuit, the public records specialist assigned to respond to Cutler-Flinn's request had left the Department. CP 449.

declaration are "opinion testimony." Cutler-Flinn's Brief, at 38. However, Cutler-Flinn is incorrect that Brannock's declaration was opinion testimony. Rather, it is testimony about a conversation that she had and was also based on Department records. CP 476. This conversation is documented in the Department records that were submitted to the trial court. CP 456. Declarations that are based on business records and personal knowledge are admissible. *Discover Bank v. Bridges*, 154 Wn. App. 722, 726, 226 P.3d 191 (2010). As such, the superior court did not abuse its discretion in declining to strike that portion of the Brannock declaration.

Finally, Cutler-Flinn asserts that a portion of the Scott Buttice declaration should be stricken because he did not identify the Department records that he reviewed to determine that Cutler-Flinn did not have separatees or prohibited placements in January 2020. Cutler-Flinn Brief, at 39. Buttice provided sufficient foundation for his statement though because his declaration indicated that he had access to records about

incarcerated individuals and had reviewed the records in order to make that statement. CP 366-67, 369. Cutler-Flinn does not provide any authority that a declarant must identify the specific records that were reviewed. Without any authority cited by Cutler, this Court does not need to consider such arguments. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). As such, Cutler-Flinn does not establish the superior court abused its discretion in considering the Buttice declaration.

Because the superior court did not abuse its discretion in considering the declarations submitted by the Department, this Court can affirm the denial of the motion to strike.

## E. Cutler-Flinn Is Not Entitled to Attorney's Fees or Costs on Appeal

A party that substantially prevails on an appeal is entitled to reasonable costs. RAP 14.2. For the above stated reasons, this Court should affirm the trial court's decision. Because the trial court's decision should be affirmed, Cutler-Finn will not

substantially prevail on appeal. Therefore, the Court should deny Cutler-Flinn any costs because he is not the substantially prevailing party.

## VI. CONCLUSION

The trial court correctly determined that the Department did not violate the PRA and dismissed Cutler-Flinn's claims. This Court should affirm the trial court's dismissal of his claims as well as the trial court's various discovery and rulings that Cutler-Flinn challenges on appeal.

This document contains 10,690 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 17th day of February, 2023.

ROBERT W. FERGUSON
Attorney General

s/ Timothy J. Feulner
TIMOTHY J. FEULNER, WSBA #45396
Assistant Attorney General
Corrections Division OID #91025
PO Box 40116, Olympia WA 98504-0116
(360) 586-1445
Tim.Feulner@atg.wa.gov

## CERTIFICATE OF SERVICE

I certify that on the date below I caused to be electronically filed the BRIEF OF RESPONDENT with the Clerk of the Court using the electronic filing system and I hereby certify that I have mailed by United States Postal Service the document to the following non electronic filing participant:

TALON N CUTLER-FLINN, DOC #405061
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 17th day of February, 2023, at Olympia, WA.

s/ Cherrie Melby
CHERRIE MELBY
Legal Assistant 4
Corrections Division, OID #91025
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445
Cherrie.Melby@atg.wa.gov

## CORRECTIONS DIVISION ATTORNEY GENERAL'S OFFICE

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